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JUN 25 1991

Christopher C. Smallwood

Attorney at Law

1718 Corcoran Street, N.W. 44

Washington, D.C. 20009

TEL 202/667-0630 FAX 202/483-0952

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

June 25, 1991

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Re: Amendment of the Commission's Rules  
Regarding Grandfathered Short-Spaced  
Stations  
RM-7651

docket # 96-120

Dear Ms. Searcy:

I am transmitting herewith on behalf of Par Broadcasting Company an original and nine copies of a "Second Supplement to Statement In Support of Joint Petition." The document is in the nature of a supplement to Par's "Statement" filed April 4, 1991. A "[First] Supplement" (and associated request for leave to file) was filed on May 3, 1991.

The purpose of the Second Supplement is to add to the record a discussion of Par's application for minor modification of facilities of Station KGMG-FM, Oceanside, California. That application was filed on June 12, 1991. The application included a request for waiver of Section 73.213 of the Commission's Rules. Appended to the Second Supplement is a copy of the waiver request. The waiver request deals, in detailed fashion, with several of the issues previously raised in the above-captioned Joint Petition for Rulemaking. The waiver request is thus highly relevant to the Joint Petition.

I am filing separately, at the same time herewith, a "Request to File Second Supplement to Statement."

Please contact me if there are any questions in connection with this matter.

Very truly yours,



Christopher C. Smallwood

CCS/md  
Enclosure

Before The  
**Federal Communications Commission**  
Washington, D.C. 20554

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JUN 25 1991

In the Matter of

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Amendment of the Commission's Rules     )  
Regarding Grandfathered Short-         )  
Spaced Stations                             )

RM-7651

To: The Commission

SECOND SUPPLEMENT TO STATEMENT IN SUPPORT OF JOINT PETITION

Par Broadcasting Company, licensee of Stations KGMG AM/FM, Oceanside, California ("Par"), is submitting this document which supplements the Statement In Support of Joint Petition filed on April 4, 1991.<sup>1</sup> The purpose of this Second Supplement is to include as part of the rulemaking file a "Request for Waiver" we recently filed. That "Request" is highly relevant to the factors which should be considered by the Commission in connection with the rulemaking Petition.

1. On June 12, 1991, we filed an application for minor change in the facilities of our FM station. That application requested authority to move our transmitter site, among other changes. The proposed move would shorten the existing, grandfathered short-spacing to a station on our third-adjacent frequency. Accordingly, we requested a waiver of Section 73.213 of the Commission's Rules.

2. As part of our application, we included a document titled "Statement of Stephen O. Jacobs: Request for Waiver." That Statement, which is attached hereto, provided an exhaustive

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<sup>1</sup> A "Request to File Supplement to Statement" is filed at the same time herewith.

discussion of the factors in support of our waiver request.

3. We now file that Statement because we believe the same issues raised in our waiver request should be considered by the Commission in the context of the question posed by the rulemaking Petition: that is, whether or not to restore Section 73.213 to its prior version. In particular, we wish to draw the Commission's attention to the following factors:

4. As shown by our waiver request, our transmitter move would reduce predicted interference areas and populations to and from our short-spaced neighbor. It is highly ironic that the current version of Section 73.213 operates as a barrier to our ability to do so. Surely the Commission can have had no other motive behind the 1987 amendment to Section 73.213 than to reduce the risk of interference. The current version of Section 73.213, at least in our situation, is an obstacle to our ability to reduce such risk.

5. When the Commission amended Section 73.213 to permit further shortening of distance between third-adjacent stations only upon the consent of the other station, its purposes were no doubt well-intentioned. Yet the "veto power" which the Commission so conveyed has not been employed in the public interest. Surely the Commission set up the "veto" mechanism for one reason only: so the affected station could guard against interference and the risk of lessened service to the public. In our case, we approached the station in question to see if we could secure such consent. That consent was refused--not on the grounds of risk of interference, but solely and admittedly

because our move would "impinge upon [the other station's] historic level of competition in the market." See Attachment A to the Statement. The current version of Section 73.213 operates, then--at least in our kind of situation--not as a safeguard against interference but as a mechanism to restrict the public's access to a competing media voice. This is not what the Commission had in mind.

6. To compound the irony, when the Commission was considering the rule change which resulted in the current version of Section 73.213 (Docket MM 86-144), the station in question argued forcefully and even eloquently in favor of keeping the then-current version of the rule (i.e., allowing grandfathered stations with shortfalls on the third adjacent frequency to freely relocate their transmitters). The comments which the station filed in that rulemaking proceeding can be found at Attachment C to the Statement. Those comments fully support the current Joint Petition for Rulemaking. Surely the Commission could never have imagined that a commenter who opposed the new rule would have used the new rule, when the opportunity presented itself, to suppress competition.

7. We respectfully submit that this history is fully relevant to the current proceeding. The Commission should be aware of how its rules operate in practice. We do not quarrel with the underlying motive behind the amendment to Section 73.213--the desire to reduce the risk of interference. In our case, the new rule has had the completely opposite effect. Further, the "veto" provision in the new rule has been

demonstrably and self-confessedly used not to protect the public but to safeguard existing market shares.

8. We request the Commission to carefully consider the facts and arguments contained in the attached "Statement of Stephen O. Jacobs: Request for Waiver." Grandfathered stations, not fully spaced as to third-adjacent operations, should be allowed to freely increase their facilities to the extent otherwise permitted. That was the law prior to 1987. We are aware of no case in which the earlier rule resulted in harm to any station. The Commission recently liberalized its policy regarding waivers for noncommercial stations on third-adjacent frequencies.<sup>2</sup> The possibility of interference is equally remote for commercial and noncommercial operators. The earlier rule maximized stations' ability to relocate in response to changing conditions. In our case, the earlier rule would have long since permitted us to reduce predicted interference areas and populations.

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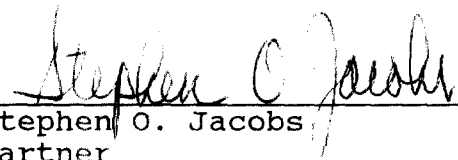
<sup>2</sup> See our "[First] Supplement to Statement in Support of Joint Petition," filed May 3, 1991.

For these reasons, the Commission should promptly commence a rulemaking proceeding looking towards restoration of the prior version of Section 73.213.

Respectfully submitted,

PAR BROADCASTING COMPANY

By:

  
\_\_\_\_\_  
Stephen O. Jacobs  
Partner

Date: 6/24/91

## APPENDIX

From Application of Par Broadcasting Company, KGMG-FM, Oceanside, California, For Minor Modification of Facilities, Filed June 12, 1991: "Statement of Stephen O. Jacobs: Request for Waiver"

STATEMENT OF STEPHEN O. JACOBS:  
REQUEST FOR WAIVER



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## SUMMARY

In this application, we, Par Broadcasting Company, licensee of Station KGMG-FM, Oceanside, California, request a waiver of the Commission's rules to allow us to relocate closer to the grandfathered short-spaced station on our third-adjacent frequency. The move will demonstrably do no harm to that station. On the contrary, the move will reduce our existing predicted interference to that station by almost 60% in terms of population. Overall, the move will reduce by more than 53% all existing populations subject to predicted interference, as well as partially cure an existing shortfall to the station on our first-adjacent channel.

The rule for which we seek waiver operates, in our case, as a harmful regulatory barrier which denies us needed flexibility in a competitive marketplace. The rule, Section 73.217, prevents us from bettering predicted interference areas.

We believe the move will enable us to deal with severe coverage problems caused by terrain. Currently, approximately 47% of the population within the 54 dBu contour of our Class B station is subject to significant signal attenuation. We are licensed for a record number of boosters (eight) because of the terrain problems we suffer. The move will result in substantial service gains allowing us to serve our market more effectively.

Our request is in line with a recent Commission decision permitting waiver of third-adjacency spacing requirements for noncommercial stations.

Our waiver request is necessary because the group owner which operates the station on our third-adjacent frequency has refused to consent to the move, on admittedly competitive grounds (Attachment A hereto).

The totality of circumstances here proves that the public interest would be best served by a grant of our waiver request.

## INTRODUCTION

I am a partner in (and general manager of) Par Broadcasting Company (Par). I am submitting this statement in support of our request for a waiver of the short-spacing rules.

The situation which our application presents is unique. The special facts of this case are unlikely to be replicated by any other applicant. A grant of our request, based on our special set of circumstances, is hardly likely to flood the Commission with numerous requests from other stations. These facts, taken in their totality, support a grant of our waiver request.

In particular, the recent decision of the full Commission in which it recognized that third-adjacent shortfalls are unlikely to result in problems, sets the stage for our request. (That decision, released on April 24, 1991 in Educational Information Corporation, is discussed on page 20 below.) Further, the figures set forth by our highly competent engineering counsel show that our move will reduce interference areas and populations to and from our third-adjacent neighbor, even though we will be moving towards that station. Overall, the population subject to predicted interference will be reduced by more than 53%. So our move will further, not frustrate, the policy which underlies the spacing rules--protection of listeners from interference.

We respectfully urge that an application which will diminish interference must be entitled to a waiver of those very rules

whose only purpose is to protect against the risk of interference. In our case, illogically, those rules operate as a barrier to reducing interference. Our move will cause no damage to any station, but on the contrary will lessen predicted interference--(1) the predicted interference we cause to our first-adjacent short-spaced station, and (2) the predicted interference that station causes us, as well as (3) the predicted interference we cause to our third-adjacent short-spaced station, and (4) the predicted interference that station causes us. Our move will make a competing media voice, for the first time, listenable for extremely high numbers of people by enabling us, we believe, to overcome severe terrain problems.

These are all public interest factors, and they support our waiver request.

## I

### BACKGROUND

Par took over Station KGMG-FM on December 31, 1982.<sup>1</sup> The station is licensed to Oceanside, California. Oceanside is in what is popularly called "North County"--that is, the northern part of San Diego County. We compete with the other stations in the San Diego market. We compete with them in every sense of the term--for listeners, for advertising revenue, for staff. We are well aware of our responsibilities to our community of license.

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<sup>1</sup>

We acquired KGMG(AM) at the same time.

Our service to Oceanside has been recognized and awarded, and we are proud of that service. Yet, in economic terms, we are part of the larger market. Our station is a Class B facility, and the Commission's own height and power rules implicitly recognize that Class B stations are meant to serve a larger area beyond the borders of the community of license.<sup>2</sup> In our case, that area is the San Diego market.

From the beginning of our stewardship, we have experienced difficulty in serving that market. In one word, the problem is terrain.

As the Technical Exhibit of du Treil, Lundin & Rackley, Inc. shows, there is "significant signal attenuation within [our] predicted 54 dBu contour in the southerly direction" (page 9). In that direction are Double Peak, Mt. Whitney, and Franks Peak mountain range. These obstructions, which form a range running roughly east to west, lie directly between our current transmitter and the densely populated areas to the south--an integral part of the market we serve. (Figure 8 of the Technical Exhibit illustrates the zone subject to significant signal attenuation because of the mountains.) Du Treil, Lundin & Rackley, Inc. has estimated that an astonishing 907,000 persons within our predicted 54 dBu are subject to shadowing. This is approximately 47% of the entire population within our 54 dBu

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<sup>2</sup> For reference, the square mileage of Oceanside comprises approximately one percent of the total County area. Source: SANDAG, San Diego Association of Governments.

contour (Technical Exhibit, page 9).

We have tried numerous ways to address our signal problems. As dramatic evidence of the signal problems we face, we are licensed for no less than eight boosters by the Commission, all within our 54 dBu contour, with less than satisfactory results. Based on informal contacts with the Commission's staff, we believe no other FM station in the country is licensed for more than three boosters. This record number of boosters graphically illustrates our signal problems.

We have investigated several alternative sites, making numerous contacts over the years with property owners and local government officials. We have tried, in vain, to secure the consent of the group owner which operates our third-adjacent station to our move. Such consent would make a waiver of Section 73.213 not needed. That consent has been denied because of the unwillingness of the group owner in question to risk its "historic level of competition in the market" (Attachment A hereto).

## II

### PREVIOUS APPLICATION

On May 11, 1989, we filed an application to move our transmitter to the so-called "Meadowlark Reservoir" which is within the mountain range blocking our signal (File No. BPH-890511IC). The application included a request for waiver of the spacing rules to allow us to move closer to KGB-FM, San Diego, on



the third-adjacent frequency. On November 16, 1989, we amended that application to specify a different site approximately 1.6 kilometers east of the site originally proposed.

On April 27, 1990 the Mass Media Bureau denied the application (8920-DEB/SBS). The Bureau ruled that Par had not shown sufficient cause to justify the amended site. The Bureau did not respond to the various public-interest arguments which we had advanced in our amendment and in the various pleadings we filed in the context of KGB's objection.<sup>3</sup> We did not ask for reconsideration or review of that denial.

The application we now file is for the same facilities requested in our November 16, 1989 amendment.

Ours is not a "repetitious application" for the following reasons.

1. More than a year has elapsed since the Bureau's denial.
2. We are not requesting the same facilities which the Bureau denied. The Bureau denied the Meadowlark Reservoir site, not the one proposed in our November 16, 1989 amendment. The Bureau specifically refused to consider the site we now propose.
3. In doing so, the Bureau did not respond to the justifications for the waiver, most particularly the reduction of interference areas and populations to and from KGB which will result from the move. Par is entitled to a decision on the merits.

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<sup>3</sup> To the extent not inconsistent with our present application, we incorporate those documents by reference.

4. Most significantly, the full Commission has changed its policy with respect to shortfalls on third adjacent channels. (See discussion below, page 20.) The different regulatory climate as to third-adjacencies justifies a fresh look at our proposal.

Particularly in light of the recent Commission decision in Educational Information Corporation, the arguments advanced by Par in support of our waiver request should be fully considered.

### III

### THE PROPOSED SITE

We believe our proposed transmitter site to be the best available to overcome our substantial signal difficulties. From that site we will be able to maintain our required level of service to Oceanside. It is an existing communications site. The proposed site is located on Lake San Marcos Peak. The site is owned and operated by the County of San Diego as a multi-user communications facility. We have had numerous contacts with the County and as a result we believe we have reasonable assurance of this site's availability.

At an earlier stage in our efforts to deal with our terrain problems, we had approached the San Diego County Communications Department regarding the suitability of space on Lake San Marcos Peak for our FM. We were told the following:

1. The one small building on the site (approximately ten by twelve feet) is completely filled with County communications

equipment.

2. The currently existing towers at the site are full and inadequate.

3. Electrical power to the site is presently at peak use and the County simply cannot add further users without overloading the capacity.

4. The County has no money budgeted to remedy the situation.

5. The County has received numerous calls from others who would like to rent space for two-way and paging communications.

In response, we have made the following offer to the County:

1. We would ourselves pay for installation of adequate electrical power to allow the site to be upgraded.

2. We would construct a 1500 square foot building, of which 600 square feet would be for the exclusive use of the County and the remaining 900 square feet for use by us and by other users.

3. We would construct a tower of approximately 150 feet to be shared by the County and by other users of the site.

Our proposal was made to Vickie Pion, Deputy Director, San Diego County Department of Information Services and later to James Kastorff, Senior Real Property Agent, County of San Diego.

We are currently involved in negotiating with the County on details of a lease. When that is finished, the County will, for a period of six weeks, advertise publicly for bids for development of the site for use as a multi-user communications

facility. If we are the sole bidder, the County Board of Supervisors would approve our lease. Our understanding is that the site would be opened up by the County only for bidders for a multi-user communications site, and further that the County would require (in case another bidder besides ourselves is successful) that space be rented to us for our FM transmitter. Based on our continuing contacts with County officials, we believe that the six-week public notice period should begin soon.

So, in either event, whether as developer of the site or as a lessee, we believe we will gain access to the site. We believe so strongly in the suitability of this site for service to the San Diego market, for ourselves as well as other private and public communications users, that we have taken the above steps towards the development of the facility.

#### IV

#### NEED FOR A WAIVER

We request a waiver of the spacing requirements in order to effectuate our proposal.<sup>4</sup> These are the reasons why a waiver is needed:

1. **No short-spaced sites are available.** When we say that there are no short-spaced sites to which we can move, this is not rhetoric. It is simple geometry. To the north, we are short-

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<sup>4</sup> Specifically, we request a waiver of Section 73.207, 73.213, and/or any other section(s) for which waiver may be necessary in order to effectuate our proposal.

spaced to KLIT-FM, Glendale. That is on a first adjacent frequency. The Pacific Ocean is to the west. Mountains are to the east. A move south, increasing the shortfall to third-adjacent KGB, is the only alternative.

The only sites of which we are aware that would make any significant improvement to our signal difficulties are the Meadowlark Reservoir site (previously proposed), and the Lake San Marcos Peak site we now propose. There is little difference in the north-south spacing between the two sites. We believe the latter option, an existing communications site, would better improve our signal problems.

**2. A recent rule change makes a waiver necessary.**

Strictly speaking, this waiver request would not be necessary if it were not for a recent amendment of Section 73.213. Under the previous version, Par's move would be in full compliance with the Commission's requirements and would not require any waiver. Under former Section 73.213(f)(2)(i), we could have increased the existing shortfall to third-adjacent station KGB, San Diego, and operated with "any facilities up to the maximum" otherwise permitted. This could have been done without KGB's sanction.

In 1987, the rule was changed to its present form. Under the current version, grandfathered short-spaced third adjacent stations can decrease the distance between their 1 mV/m contours

only if they get the consent of the other station.<sup>5</sup>

The Commission thus replaced a "free move" with a "move by consent" requirement.

We note here that we were simply unable to make the move we now propose before the rule changed

For at least part of the period during which we could have made the move without technically being required to ask for a waiver, the County had a moratorium on construction of the type we propose. Indeed, at one point prior to our earlier application, we were flatly told that the Lake San Marcos Peak site was not available. We later proposed to build new facilities at our expense and that caused the appropriate officials to change their minds.

The Commission should also be aware that a proposal is pending to amend the rule back to its pre-1987 form.

On February 1, 1991, the engineering firms of Hatfield & Dawson; du Treil, Lundin & Rackley, Inc.; and Cohen, Dippell and Everist, P.C., filed a Joint Petition for Rule Making. That Petition requested, among other items, that the provision here under consideration be restored to its earlier version--that is, to allow grandfathered stations short-spaced on third-adjacent channels to freely move their transmitters and operate at full facilities.

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<sup>5</sup> Section 73.213(a) would require, in addition to KGB's consent, a public-interest showing. We believe the factors relied upon below amply show that our move would be in the public interest.

That petition was listed on a Public Notice, "Petitions for Rulemaking Filed," Report No. 1839, released March 6, 1991. It was designated RM No. 7651. We filed a Statement in support of the Petition on April 4, 1991, as well as a Supplement on May 3, 1991.

Favorable Commission action on that pending Petition would, of course, make this waiver request unnecessary.

**3. KGB will not consent to our move.** In spite of the fact that our move will reduce predicted interference areas and populations to and from KGB (see below, page 18), that station has refused to consent to our move.

In its turndown of our Meadowlark Reservoir site, the Broadcast Bureau stated (page 4): "We note that the rules provide a means by which [Par] could implement its proposal. That is, by signing an agreement with KGB, Inc. and providing the required public interest showing.... [Par] has not chosen to apply under these provisions (footnote omitted)."

We have, in good faith, tried to get such consent. That request was turned down. We received the response (from a partner of KGB's group owner<sup>6</sup>) included here as Attachment A. That letter says, in part:

As you know, we both compete in a very competitive market place. Our cooperation in allowing another competitive signal in the

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<sup>6</sup> Per The Broadcasting Yearbook (1991), that group owns AM/FM combinations in San Diego, Fresno, and Sacramento, as well as FMs in San Francisco and Bremerton, Washington. In contrast, we own no broadcast stations apart from KGMG AM/FM.

San Diego metro would not serve KGB's best interests.

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We try to accommodate fellow broadcasters in the marketplace in Technical and other areas, but only to the point that it does not impinge upon our historic level of competition in the market

The letter is extremely revealing. There is not the slightest hint in the letter that KGB has any concern for interference. KGB's opposition to our move is, self-confessedly, based not on interference but on competition.<sup>7</sup> Although KGB should perhaps be commended for not trying to cloak its own self-interest in a "public interest" mantle the fact remains that this case must be seen for what it is: a case not of interference, but of competition--an attempt by KGB to veto increased non-interfering service by ourselves simply so that KGB can maintain its "historic level of competition in the market".

The letter at Attachment A does no more than confirm what were clearly the anti-competitive purposes of KGB in opposing our earlier application. At that time, KGB's general manager was quoted in a local newspaper as saying, "I don't want the competition." (See Attachment B).

The Commission should not allow its processes to be used to suppress competition. On the contrary, the Commission's mandate to further the public interest can be best served by allowing listeners to have a new media voice. Competition in broadcasting

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<sup>7</sup> By that letter, KGB refused even to meet with us to discuss our request.



should be fostered, not blocked. Our proposal should be considered on its merits, not on KGB's desire to preserve its "historic level of competition in the market."

The Commission should be aware that KGB's position on Section 73.213 has been completely about-face. In the proceeding which resulted in the current version of the rule (MM Docket No. 86-144), KGB filed comments in favor of keeping the old version of the rule! Those comments are included here as Attachment C. They were signed by the same individual who signed Attachment A.

In those comments, KGB eloquently makes our present case for us.

With regard to limiting short-spaced stations to their present spacing, this "miscellaneous" issue is actually a proposal of major consequences.

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During the past few years, hundreds of stations including KGB-FM have realized that in order to survive, they must locate their transmitters at the very best possible sites to maximize coverage, regardless of the cost or difficulty. In many cases, securing and developing these sites has been a very time consuming process.... In other cases, the growth of population over the years redefines the service area. Mountaintop sites which were once on the fringe of a metropolitan area are now in the center of that area.

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These processes of new site development and population redistribution are ongoing. We strongly disagree with the premise in the proposed rulemaking that short-spaced FM stations have had ample time to make changes in their facilities.... San Diego is rapidly growing to the north. Many of the stations here would be effectively locked into their present sites, prohibiting them from adequately serving the entire metropolitan area.

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